



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2012

Ms. Donna L. Johnson
Olson & Olson, LLP
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019-2133

OR2012-11681

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 460238.

The Spring Valley Police Department (the "department"), which you represent, received a request for sixteen categories of information related to a specified incident involving the requestor's client and a named police officer. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have marked a portion of the submitted information as non-responsive to the present request. This ruling does not address the public availability of non-responsive information, and the department need not release non-responsive information in response to this request.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we note a portion of the submitted information falls within the scope of section 552.022(a) of the Government Code. Section 552.022(a)(3) provides for required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(3). In this instance, the submitted cellular telephone billing records constitute information in an account relating to the expenditure of public or other funds by the department. Thus, the records at issue are subject to disclosure under section 552.022(a)(3). Although the department raises sections 552.103 and 552.108 as exceptions to disclosure of the billing records, these sections are discretionary exceptions that do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the department may not withhold the submitted billing records, which we have marked, on the basis of sections 552.103 and 552.108. However, we note the submitted information may be subject to sections 552.117 and 552.136 of the Government Code.² Because sections 552.117 and 552.136 make information confidential for purposes of section 552.022(a)(3), we will address the applicability of those exceptions to all of the submitted information. We will also address your arguments under sections 552.103 and 552.108 for the information not subject to section 552.022(a)(3).

You claim the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.103. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the information at issue relates to a criminal prosecution that was pending when the department received the request for information. We note, however, the department is not a party to the pending criminal litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. Because you have not provided such a representation, we conclude the department may not withhold the information at issue under section 552.103 of the Government Code.

Next, we will address your arguments under section 552.108 of the Government Code for the information not subject to section 552.022. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue relates to a pending criminal prosecution. Based on your representation and our review, we conclude the release of the information we have marked would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information we have marked. However, you have not demonstrated how the remaining information at issue, consisting of an officer's time sheet and cellular telephone records, is related to the pending prosecution. Therefore, we find section 552.108(a)(1) is not applicable to the remaining information at issue, and it may not be withheld on that basis.

We note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public

by *Houston Chronicle*). Therefore, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(1).

Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 508 (1988) (release of dates of prison transfer could impair security), 413 (1984) (release of sketch showing security measures to be used during execution would unduly interfere with law enforcement). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

You seek to withhold the officer’s time sheet under section 552.108(b)(1) and state its release may jeopardize public safety and overall law enforcement by helping criminals identify times when police protection is reduced and allowing them to adjust times and locations of illegal activities accordingly. You also seek to withhold the highlighted telephone numbers in the cellular telephone records not subject to section 552.022(a)(3) and state “an analysis of the numbers called by the officer could compromise an investigation or reveal a pattern of police practices that could allow a criminal to avoid detection of a crime or aid in more effective commission of future crimes.” Based on your representations and our review, we find the department may withhold the officer’s time sheet and an officer’s cellular telephone number, which we have marked, under section 552.108(b)(1) of the Government Code. However, we are unable to determine if any of the other highlighted telephone numbers are assigned to department officers. Accordingly, we must rule conditionally for this information. Therefore, to the extent the highlighted telephone numbers at issue are assigned to department officers, they may be withheld under section 552.108(b)(1) of the Government Code. However, to the extent the highlighted telephone numbers at issue do not belong to department officers, they may not be withheld under section 552.108(b)(1) of the Government Code.

We note some of the highlighted telephone numbers in the remaining information, including the highlighted telephone numbers in the billing records subject to section 552.022, may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code exempts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone or pager number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) exempts from disclosure peace officer's cell phone or pager number if officer pays for cell phone or pager service). Therefore, to the extent the highlighted telephone numbers consist of the home or personal cellular telephone numbers of department officers or belong to family members of department officers, the department must withhold those numbers under section 552.117(a)(2) of the Government Code.

We note the remaining information, including the billing records subject to section 552.022, contains an account number subject to section 552.136 of the Government Code. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The department must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code.

In summary, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(1). The department may withhold the officer's time sheet and the telephone number we have marked under section 552.108(b)(1) of the Government Code. To the extent the highlighted telephone numbers in the records not subject to section 552.022 are assigned to department officers, they may be withheld under section 552.108(b)(1) of the Government Code. To the extent the highlighted telephone numbers in the remaining information, including the numbers in the billing records subject to section 552.022, consist of the home or personal cellular telephone numbers of department officers or belong to family members of department officers, the department must withhold those numbers under section 552.117(a)(2) of the Government Code. The department must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 460238

Enc. Submitted documents

c: Requestor
(w/o enclosures)